to have been recognized even in a relatively late dictum of the New York Court of Appeals, *Nichols* v. *White* (1881) 85 N. Y. 531, 536, and it has been embodied in the proposed American Partnership Act, Reports of Amer. Bar Ass'n, (1906), Pt. II, 440, §§ 14, 38, though the existing rule is probably sanctioned by the weight of American authority. 22 Am. & Eng. Encyc. L. (2nd Ed.) 217. The argument that any rule other than broad exclusion is dangerous because ill-feeling often follows partnership dissolution, cf. *Gleason* v. *Clark* (1828) 9 Cow. 57, 59, should go to the weight and not to the competence of such admissions. Cf. *Western Assurance Co.* v. *Towle, supra,* 256; *King* v. *Hardwick* (1809) 11 East 578, 586. The present New York rule may be of easier application; but the consequent reduction of opportunity for reversible trial error hardly justifies divergence from principle.

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EQUITABLE JURISDICTION OF MUTUAL ERROR OF LAW.—Courts are in substantial accord upon two aspects of this subject. First, mutual mistake of foreign law is relievable. Such error, while almost universally regarded as pure error of fact, Kerr, Fraud and Mistake (2nd Ed.) 466; *Imperial etc. of Trieste* v. *Funder* (1872) 21 Week. R. 116, is as genuine mistake of law as mistake of the *lex fori.* The true basis—that the ignorance concerns that which the individual is excusable for failure to know—has apparently been overlooked. Second, in compromises the existence of mistake, properly so-called, is manifestly impossible. Both parties have done just as intended, namely, to assume the contingency of gaining or losing by the arrangement according as the law should prove. *Hall* v. *Wheeler* (1887) 37 Minn. 522. Family settlements, in so far as they involve this element, proceed upon the same principle. *Burnes* v. *Burnes* (1904) 132 Fed. 485. It has been suggested, without attempt at definition of the language employed, that when both parties to the compromise mistake a "plain and settled principle of law" relief should be granted. Sir John Leach in *Naylor* v. *Winch* (1824) 1 Sim. & Stu. 555. 564. This distinction, it is submitted, is not only unsupported by authority, cf. *Faust's Adm'x* v. *Birner* (1860) 30 Mo. 414, but logically unsound, for the error is less excusable and *pari passu* more reprehensible than where a dubious and disputed rule is in question. Cf. *Good* v. *Herr* (Pa. 1844) 7 Watts & S. 253. The substantial recognition of these principles, unsettled as they still are in some respects, is in striking contrast with the numerous conflicting views of the proper jurisdictional test for error of law in general.

Where the written instrument, from error as to the legal effect of the language used, fails to express the intention of the parties, for example, where a scrivener misuses technical terminology, *Hunt* v. *Rousmanier* (1823) 8 Wheat. 174; (1828) 1 Pet. 1, or errs in the legal force of a description, *Pitcher* v. *Hennessey* (1872) 48 N. Y. 415, and the parties accept the document under the belief that it sets forth their bargain, the weight of judicial authority and the majority of text writers, Pomeroy, Eq. Jur., §§ 843, 845; Story, Eq. Jur., § 114, insists that "equity will grant relief * * * and it matters not whether such mistake be called one of law or fact." Beach, Mod. Eq. Jur., 540; cf. *Canedy* v. *Marcy* (Mass. 1859) 13 Gray 373.

In a recent Massachusetts case of this character the mistake was regarded as "pure error of fact." *Eustis Mfg. Co.* v. *Saco Brick Co.* (Mass. 1908) 84 N. E. 449. If the mistake be one of fact, reformation may, of course, as in all bilateral error of fact, be granted. But, whether the legal force of the words employed be mistaken by the parties themselves or by their agent, the mistake seems clearly error of law as to the nature of the agreement adopted. *Fowler* v. *Black* (1891) 136 Ill. 363. The distinction between such cases and cases in which the parties mistake the legal effect of an instrument—which practically all authorities, *Eldridge* v. *Dexter etc. R. R. Co.* (1895) 88 Me. 191; *Dupre* v. *Thompson* (1848) 4 Barb. 279; *Proctor* v. *Thrall* (1850) 22 Vt. 262, including the authors above cited, Pomeroy, Eq. Jur. § 843; Story, Eq. Jur. §§ 112, 113, join in declaring unrelievable—is trifling, if indeed, discoverable at all, from any logical standpoint. The parties agree upon the writing as stating their contract in the one instance as fully as in the other. 5 COLUMBIA LAW REVIEW 376. The significance of the desire to find the non-existent element of error of fact and thereby explain the relief granted in this class of cases is very manifest.

A recent Virginia case, *Burton* v. *Haden* (1908) 60 S. E. 736, in effect overruling an earlier decision, *Zollman* v. *Moore* (Va. 1871) 21 Gratt. 313, illustrates the tendency to regard error of antecedent and existing private rights—whether mutual or unilateral—as relievable, in contradistinction to error of law with respect to the legal effect of an instrument. Pomeroy, Eq. Jur. § 849. On the ground that both parties were laboring under the erroneous impression that the grantor was entitled under a deed to a lesser estate than the deed actually conveyed, Chancery set aside a conveyance of the "entire interest." The court regarded the error "as analogous to, if not identical with, a mistake of fact." That the mistake logically, under the authorities, and from the standpoint of the Civil Law, whence the maxim *Ignorantia juris non excusat* was derived, is mistake of law and logically indistinguishable from error as to the legal effect of an instrument, concededly unrelievable, *supra*, was indicated in 8 COLUMBIA LAW REVIEW 211, in a discussion of unilateral error. However erroneous and unsound it may be to regard the mistake as one of fact, that position is nevertheless at least intelligible, when compared with the view which regards the mistake as partaking of both and yet *in toto* of neither, *Goff* v. *Gott* (Tenn. 1858) 5 Sneed 562; *Gerdine* v. *Menage* (1889) 41 Minn. 417, and which not only unnecessarily creates a veritable *terram incognitam*, but fails to note that in every statement or misstatement of law, a fact—the condition of the law—is necessarily stated. See *Purvines* v. *Harrison* (1894) 151 Ill. 219.

In a note to Story, Eq. Jur. (13th Ed.) 115 et seq., Prof. Bigelow suggests that where the parties have deliberated on the law and then have chosen a course of action, equity should never relieve; *vice versa*, if there was unconscious ignorance of the existence of any question of law. Mr. Woodward, in 5 COLUMBIA LAW REVIEW 377 et seq., modifies this by submitting "the test of choice, with or without deliberation." Apart from any question of the premium seemingly placed upon ignorance as distinguished from intelligent activity, not only does the enforcement of either proposed rule present serious practical difficulty, but the authorities fail even to inti-

mate its existence, or to extend judicial favor to it, even where the subject is *res nova*. While its sponsors express "no doubt that a large number of cases may be brought into line with it," this contention is gravely open to doubt. In New York, for example, the test fails completely. *Maher* v. *Hibernia Ins. Co.* (1876) 67 N. Y. 283; *Marsh* v. *McNair* (N. Y. 1888) 48 Hun 117; *Dupre* v. *Thompson, supra.* See also *Ottenheimer* v. *Cook* (Tenn. 1872) 10 Heisk. 309; *Stedwell* v. *Anderson* (1851) 21 Conn. 139; *Easter* v. *Severin* (1881) 78 Ind. 540; *Eldridge* v. *R. R. Co., supra.*

While in numerous cases other and possibly controlling equities are present, *Pittsburgh etc. Co.* v. *Lake etc. Co.* (1898) 118 Mich. 109, 128, it must be conceded that in numerous cases, Chancery has granted relief on one theory or another. The weight of authority to-day, however, is still in accordance with the rule *Ignorantia juris non excusat*, which, a high authority notwithstanding, Scott, Cases on Quasi-Contracts, 406, Note 1, has been recognized from the earliest periods of equity jurisdiction. Doctor and Student, Dial. 1, ch. 26; Dial. 2, ch. 46; *Irnham* v. *Child* (1781) 1 Bro. Ch. 92. The unsound basis of the maxim in principle as applied to civil cases, its contrariety, to Continental thought, 7 COLUMBIA LAW REVIEW 476, and the lack of reason, from the standpoint of natural justice, for allowing relief for mutual ignorance of fact, yet denying it for mutual ignorance of law, explain the illogical and increasing exceptions, of which the two principal cases are characteristic. It is submitted that the true remedy for the unfortunate situation can be found only in legislative action, and the newer and more progressive jurisdictions, alive at once to the strength of *stare decisis* in modern equity, 5 COLUMBIA LAW REVIEW 25, and to the necessity for relief, have not been slow to adopt this solution. N. Dak. Civ. Code § 3854; Cal. Civ. Code § 1578; S. Dak. Civ. Code § 1207; Oklahoma Revised Statutes, Ch. 15, § 20.

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LAWFUL POSSESSION BY MORTGAGEE AFTER DEFAULT IN NEW YORK.—Prior to the statute of 1830, which deprived the mortgagee of the right to bring ejectment, the mortgagee's position at law had already become anomalous. *Runyan* v. *Mersereau* (N. Y. 1814) 11 Johns. 534; *Jackson* v. *Crafts* (N. Y. 1820) 18 Johns. 110; *Jackson* v. *Bronson* (N. Y. 1822) 19 Johns. 325. It was, however, asserted or assumed that the mortgagee had a legal estate after default, *Jones* v. *Clark* (N. Y. 1822) 20 Johns. 51; *Jackson* v. *Bowen* (N. Y. 1827) 7 Cow. 13; *Jackson* v. *Minkler* (N. Y. 1813) 10 Johns. 480, and lawful possession might be acquired without the mortgagor's consent in the absence of force, e. g., a mortgagor's tenant after default might attorn to the mortgagee. *Jones* v. *Clark, supra.* No substantial change immediately followed the statute. On the theory that its sole purpose was to save costs to the mortgagor by removing one of the mortgagee's concurrent remedies, the mortgagee's legal estate after default was held to be undiminished thereby. *Phyfe* v. *Reilly* (N. Y. 1836) 15 Wend. 248. Possession unfairly acquired seems early to have been regarded lawful. *Goldsmith* v. *Osborne* (N. Y. 1833) 1 Edw. Ch. 560. In *Van Duyne* v. *Thayre* (N. Y. 1835) 14 Wend. 233, the court mentioned two modes of acquiring lawful possession, consent of the mortgagor or legal proceedings. This decision, standing alone,